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Attorneys for Debtors BCE West, L.P. et al.

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF ARIZONA**

| | |
|---|---|
| In Re:<br><br>BCE WEST, L.P., et al.,<br><br>Debtors.<br><br>EID: 38-3196719 | Chapter 11<br><br>Case No. 98-12547 through 98-12570 PHX CGC<br><br>Jointly Administered<br><br>**DEBTORS' OPPOSITION TO AD HOC COMMITTEE'S (1) MOTION TO SET HEARING OR OTHERWISE DESIGNATE HEARINGS AND (2) RESPONSE AND OBJECTION TO MOTIONS**<br><br>**Date: October 26, 1998**<br>**Time: 10:00 a.m.**<br>**Place: 10th Floor**<br>**Courtroom 6**<br>**Phoenix, Arizona** |

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BCE West, L.P., Boston Chicken, Inc., Mayfair Partners, L.P., BC Great Lakes, L.L.C., BC GoldenGate, L.L.C., B.C.B.M. Southwest, L.P., BC Boston, L.P., BC Superior, L.L.C., BC Heartland, L.L.C., BC Tri-States, L.L.C., Finest Foodservice, L.L.C., BC New York, L.L.C., R&A Food Services, L.P., P&L Food Services, L.L.C., Mid-Atlantic Restaurant Systems, Inc., BCI Massachusetts, Inc., BCI Southwest, Inc., BC Real Estate Investments, Inc., BCI Mayfair, Inc., Progressive Food Concepts, Inc., BCI R&A, Inc., BCI West, Inc., BCI Acquisition Sub, L.L.C., Buffalo P&L Food Services, Inc., debtors and debtors in possession (the "Debtors"), file this Opposition to the Ad Hoc Committee’s (1) Motion to Set Hearing or Otherwise Designate Hearings and (2) Response and Objections to Motions, and in support respectfully submit the following:

1. On October 15, 1998, counsel for an Ad Hoc Committee of Unsecured Creditors (the “Ad Hoc Committee”) filed a Motion to Set Hearing or Otherwise Designate Hearings Set for October 26, 1998, as Status Conferences (the “Designation Motion”).

2. The sole ground alleged in support of the Designation Motion is that the initial meeting of the Official Unsecured Creditors Committee (“Committee”) has been scheduled for October 20, 1998, and, as a consequence, there would be “insufficient time for the Committee to complete a meaningful review [sic] the many pleadings filed to date, file a response by the October 20, 1998, deadline, and prepare for the hearings set for October 26, 1998.”

3. In point of fact the Official Committee was formed on October 20, 1998, counsel for the Ad Hoc Committee was retained as counsel for the Official Committee and the financial advisors previously hired by the Ad Hoc group have submitted a proposal to

be retained by the Official Committee. Consequently, it seems logical that the Designation Motion is now moot.

4. On or about October 19, 1998, the Ad Hoc Committee filed an additional pleading entitled "Response and Objections of Ad Hoc Committee of Bondholders to Motions Scheduled to be Heard on October 26, 1998" (the "Objection"). In the Objection the Ad Hoc Committee identifies 10 of the Debtors' pending motions with respect to which it has no objection, one motion as to which there is a "limited objection" and seven motions as to which there are alleged to be substantive objections.

5. For the reasons stated below and in consequence of the retention by the Official Committee of the professionals that worked for the Ad Hoc Committee, the Debtors assert that sufficient cause does not exist to grant the relief requested in the Designation Motion, and, further, it is the Debtors' business judgment that the consideration of the matters presently set by this Court for hearing on October 26, 1998, is important, and in some instances crucial, to the successful reorganization of these companies. Accordingly, the Debtors request that the Court overrule the substantive objections set forth in the Objection and grant the relief requested.

6. By way of historical background, the Ad Hoc Committee was formed at the request of the Debtors in early August. At the expense of the Debtors, the Ad Hoc Committee hired the law firm of Hebb & Gitlin as its legal counsel and Houlihan Lokey Howard and Zukin as its financial advisor.

7. As of the date of the filing of these Chapter 11 cases the Debtors had paid Hebb & Gitlin in excess of $300,000 in fees and expenses, and Houlihan had received in excess of

$600,000 in payment of fees and expenses incurred in the performance of their respective functions for the Ad Hoc Committee.

8. During the period from the formation of the Ad Hoc Committee to the Petition Date these professionals had virtually unlimited access to the Debtors' operational and financial information. On several occasions Debtors' management met with the professionals and one or more of the committee's members to answer questions, discussing operating strategy and address any other concerns raised by either the committee or its professionals.

9. Prior to the Petition Date the Debtors provided the committee's professionals with draft documents relating to the Debtors' efforts to obtain postpetition financing. As soon as the final credit agreement and the related debtor in possession financing order had been finalized, a copy was faxed to the committee's counsel. Counsel for the Ad Hoc Committee has certainly had more than adequate time and opportunity to review the documents, make comments and suggest changes. As evidenced by the Objection and the detail of the commentary, it seems relatively clear that the interests of the holders of the Debtors' subordinated debt obligations and now the Official Committee are being represented more than adequately.

10. What is not so clear is the real reason for taking the position asserted in the Designation Motion that <u>all matters</u> set for hearing should now be passed until some unspecified date in the future. In fact, the statements contained in the Objection are inconsistent with the assertions made in the Designation Motion. Because the Ad Hoc Committee's counsel was selected to represent the Official Committee, their extensive knowledge of the facts and circumstances surrounding the Debtors' business affairs and operations completely alleviate the proffered hardship of having six days to review documents and prepare for the October 26

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hearings. Bringing the Official Committee members up to speed on the pending matters should not be difficult since four of its seven members were also members of the Ad Hoc Committee. One of the additional members of the Official Committee is one of the indenture trustees for the Debtors' public debt obligations.

11. Obtaining final approval of the debtor in possession financing facility and final confirmation of the Debtors' authority to use cash collateral and collateral is, in management's opinion, crucial to the continued rehabilitation of the Debtors' business operations. Having fiscal stability and liquidity is absolutely necessary for the Debtors' operations in this particularly sensitive phase of the Debtors' reorganization efforts. The public's perception of the Debtors' ability to continue its business operations and make positive strides forward in business revitalization is of considerable consequence. Debtors' management has exerted significant efforts to ensure creditors, employees and customers that the business remains viable and that the goods and services provided will remain at the highest possible quality level. Failure to ensure stable and substantial financing for operations will severely undermine these efforts.

12. Any contrary conclusion reached by those arguing for the relief sought in the Designation Motion or the Objection is simply wrong.

13. The only true substantive objection to the terms proposed for the Final Order approving the DIP loan facility is the language of the order which deletes from the amount denominated as a "Carve Out" any fees and expenses that are incurred in pursuit of claims against the 1996 secured lender group which includes the financial institutions providing the DIP facility. In the circumstances of these cases, it is the Debtors' view that such a restriction is not unreasonable. All of the bond debt is subordinated to the claims of the secured creditor group

regardless of whether the claims are fully secured or only partially secured. Therefore, pursuit of any avoidance actions seeking to set aside lien claims is, from the Debtors' perspective, a fruitless effort. The Debtors do not want to have an unnecessary expenditure of estate resources on account of efforts that will have no ultimate benefit to the creditor group pursuing such claims. Simply stated, the Debtors think there is no value to avoidance actions against the secured lenders. Therefore, neither cash collateral nor DIP facility proceeds should be used to fund such activities.

14. The objections lodged with respect to the adequate protection provisions relating to the use of cash collateral and collateral also lack merit in the context of these cases. There is no question that there is a value attributable to the use of both types of collateral. There is also no question that use of cash requires protection, and that the continued use of the personal property collateral results in a decline of the value of such collateral. It is only the magnitude or quantification of the decline that is at issue. The Debtors and the lenders have agreed after arms' length negotiations that adequate protection could best be achieved by monthly payments in an amount equal to the interest accruing on the debt. The parties determined that in order to avoid a lengthy and costly evaluation hearing at this stage of these cases, an amount equal to accruing interest would suffice as the appropriate measure of adequate protection.

15. Both of the adequate protection orders provide that all payments, whether of interest or fees and expenses to agents, are provisional in nature. All rights to have the Court review such payments in the context of § 506 hearings are being preserved. Therefore, if, at a future date, the matter is brought before the Court and there is a determination that payment was inappropriate, one method of adjustment would be to have such prior payments characterized as principal payments.

16. It is the Debtors' business judgment that interest and fees payable under the various prepetition agreements should be paid currently and not be allowed to accrue resulting in a significant increase in the senior debt obligations. The Debtors' operating budget includes the payment of interest, fees and expenses to the lenders and to the lenders' agents.

17. Equally important to the stability and rejuvenation of the Debtors' business as obtaining final authorization for financing and use of cash collateral are the following motions now set for hearing on October 26:

a. adequate assurance of payment of utilities;

b. payment of prepetition sales taxes;

c. assumption of employment contracts;

d. assumption of employee retention bonus plan;

e. honoring prepetition gift certificates;

f. rejection of unexpired, nonresidential real property leases;

g. rejection of executory agreements relating to employees;

h. employment of Huntley Financial Group as real estate consultants; and

i. assumption of supply agreement with Coca-Cola USA.

18. Matters a. through e. above are a continuation of the Debtors' desire to ensure the continuation of present corporate operational levels and strengths. As emergency consideration

was not imperative, the Debtors did not request that these matters be included in the "first day" orders. However, their importance to operational stability should not be diminished.

19. Rather than have extensive hearings devoted to the desires of some 600 utility companies to have some form of "adequate assurance," the Debtors propose to continue the current status of each utility company account. Similarly, as most sales tax accounts are trust fund accounts, no creditor of these Debtors is prejudiced by the Debtors' desire to keep its sales tax payments in a current status. The importance of honoring customer gift certificates is self-evident.

20. As previously stated by the President and Chief Executive Officer, the employees are the backbone of the business. Without their continued support the desired turnaround and reorganization is problematic at best. It is management's business judgment that assumption of certain existing employment contracts as well as the confirmation of the Debtors' employee retention bonus plan is essential to confirm to all employees the continued commitment by the company, the creditors and this Court to the proposition that hard work resulting in business rehabilitation will yield a financial benefit to all concerned. Additionally, the continuation of economic incentives will encourage all management personnel to remain at the helm and continue their essential efforts to help the Debtors' steer the course of reorganization. Management believes that maximum employee retention, effort and loyalty will be insured by approval of contract and bonus plan assumption. These motions cover some 935 employees.

21. Attached as Exhibit "A" is a summary of the classifications and amounts of the retention bonuses that would be paid during the years 1999 and 2000 if the Court approves the assumption of the retention program. It should be noted that of the projected payments of some

$18,000,000 over the next two years the payment of approximately $15,700,000 is directly tied to store performance. Without the projected in store performance, bonus payments will be at a much lower level. Further, the total amount of projected bonuses is within the business plan budget that is submitted in support of the matters for which relief is being sought, and which provides the basis for the DIP financing facility. Finally, while the intent of the bonus plan is retention, it will not be 100% effective, and the actual payout will be reduced from the projection by the effect of some unknown amount of turnover. Management judges that this turnover will be reduced, to the substantial benefit of the business, by the assumption of the bonus plan.

22. The remainder of the items covered in motions identified in paragraph 16 has been submitted by management for prompt consideration in the exercise of their prudent business judgment. Granting the relief requested in each of these motions will result in significant economic benefit to the Debtors. For example, approving the rejection of some 178 real property leases on October 26 will save the estate tens of thousands of dollars in administrative expenses.

23. The motions seeking the following relief are important for consideration to continue the present efficient, economic and expeditious administration of these cases:

a. establishment of hearing schedule and procedures;

b. establishment of procedures for interim compensation;

c. establishment of standing order for notice and motion procedures;

d. authorization to employ and compensate ordinary course professionals; and

e. authorization to employ Arthur Andersen L.L.P. as accountants.

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24. With respect to the objection lodged against the motion to retain Arthur Andersen L.L.P., it is the Debtors' present intention (to be reflected in an amended application to be filed at or before the hearing) that this accounting firm will be hired only for the limited purpose of completing the work that it began in assisting the Debtors in preparation for the administrative requirements of this case such as preparation of schedules, statements of financial affairs and the associated documents for each of the 24 debtors. It is the Debtors' view that such limited retention is in the nature of a special counsel, and, therefore, the requirement of disinterestedness would not be applicable. The Debtors made this decision in order to avoid duplication of effort and fees as Arthur Andersen was intimately familiar with Debtors' accounting system and books and records. The fact that each debtor filed its schedules and statement of financial affairs within the initial 15 days of the filing of these cases proves the point and the efficacy of the retention of Arthur Andersen.

25. Each of the above referenced matters is administrative in nature. The proposition espoused in the Designation Motion that a creditors' committee needs a significant extension of time to consider and respond to these motions cannot be taken seriously.

26. In light of the foregoing facts and circumstances, the Debtors request that the relief requested in the Designation Motion and in the Objection be denied in all respects.

Respectfully submitted this 21st day of October 1998.

DEBTORS AND DEBTORS-IN-POSSESSION

By: /s/ Randolph J. Haines 05440
One of their Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 22, 1998 the foregoing document was served as required by the orders and rules of this Court and the Bankruptcy Rules, on all parties on the Master Service List #2.

/s/ Marilyn Schoenike

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# EXHIBIT "A"

| Retention Bonus Summary | | | | |
|---|---|---|---|---|
| | | Eligible People | Average Bonus Per Person | Aggregate Bonus |
| **Field** | | | | |
| | | | | |
| | General Managers | 800 | $ 15,907 | $ 12,725,560 |
| | | | | |
| | Area Managers | 86 | 27,347 | 2,351,874 |
| | | | | |
| | Vice President of Operations | 10 | 79,535 | 636,278 |
| | | | | |
| | **Total** | 896 | 17,538 | 15,713,712 |
| | | | | |
| **Support Center** | | | | |
| | | | | |
| | Managers | 2 | 12,915 | 25,830 |
| | | | | |
| | Directors | 15 | 21,937 | 329,050 |
| | | | | |
| | Sr. Directors | 5 | 35,310 | 176,550 |
| | | | | |
| | Vice Presidents | 14 | 87,441 | 1,224,173 |
| | | | | |
| | Other Officers | 3 | 200,000 | 600,000 |
| | | | | |
| | **Total** | 39 | 60,400 | 2,355,603 |
| | | | | |
| **Grand Total** | | 935 | $ 19,325 | $ 18,069,315 |
| | | | | |
| **Payment Schedule** | | | | |
| | Payment | Amount | Period | |
| | | | | |
| | First | $6,023,105 | Period 10, 1999 | |
| | | | | |
| | Second | 6,023,105 | Period 4, 2000 | |

| | | | | |
|---|---|---|---|---|
| | | | | |
| | Third | 6,023,105 | Period 10, 2000 | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Field Retention Bonus** | | | | | | | |
| **Assumptions** | | | | | | | |
| **General Assumptions:** | | | | | | | |
| | | | Period 11, 1998 through | | | | |
| | | | Period 10, 1999 | | | | |
| | | | | | | | |
| | Aggregate Sales | | $ 721,009,212 | | | | |
| | *Weekly Per Store Average* | | *17,332* | | | | |
| | | | | | | | |
| | Total Controllable Income (TCI) | | 212,092,662 | | | | |
| | *Percent of Net Revenue* | | *29.4%* | | | | |
| | | | | | | | |
| **General Manager (GM)** | | | | | | | |
| | *Retention Bonus equals 200% of Base Bonus received from Period 11, 1998 to Period 10, 1999.* | | | | | | |
| | | | | | | | |
| | Base Bonus Calculation | | | | Savings Versus Replacement | | |
| | | | | | | | |
| | 50% of Managers Receive 4.5% of TCI | | 4,772,085 | | | | |
| | 50% of Managers Receive 1.5% of TCI | | 1,590,695 | | | Replacement | Savings |
| | Total Base Bonus | | 6,362,780 | | | Cost | |
| | | | | | | | |
| | Retention Bonus @ 200% of Base Bonus | | 12,725,560 | | Aggregate | 39,028,000 | 26,302,440 |
| | | | | | | | |
| | Retention Bonus Per GM | | 15,907 | | Cost Per GM | 48,785 | 32,878 |
| | | | | | | | |
| **Area Manager (AM)** | | | | | | | |
| | *Retention Bonus equals 33.3% of General Managers Base Bonus + Tenure bonus* | | | | | | |
| | | | | | | | |
| | Retention Bonus @ 33.3% of Base Bonus | | 2,118,806 | | Savings Versus Replacement | | |
| | 5% of AMs at 0 to 3 year 0% Tenure Bonus | | - | | | Replacement | Savings |
| | 80% of AMs at 3 to 5 year 10% Tenure Bonus | | 169,504 | | | Cost | |
| | 15% of AMs at 5+ year 20% Tenure Bonus | | 63,564 | | | | |
| | Total Retention Bonus | | 2,351,874 | | Aggregate | 11,401,192 | 9,049,318 |
| | | | | | | | |
| | Retention Bonus Per Area Manager | | | | Cost Per AM | | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | 27,347 | | | 132,572 | 105,225 |
| | | | | | | | |
| **Vice President of Operations (VPO)** | | | | | Savings Versus Replacement | | |
| | *Retention Bonus equals 10% of General Manager Base Bonus* | | | | | Replacement Cost | Savings |
| | Retention Bonus @ 10% of Base Bonus | | 636,278 | | Aggregate | 3,461,538 | 2,825,260 |
| | | | | | | | |
| | Retention Bonus Per VPO | | 79,535 | | Cost Per VPO | 432,692 | 353,158 |
| | | | | | | | |
| | | | | | Savings Versus Replacement | | |
| | | | | | | Replacement Cost | Savings |
| **Total Field Retention Bonus** | | | 15,480,643 | | Aggregate | 53,890,730 | 38,410,087 |

| | | | | | | |
|---|---|---|---|---|---|---|
| **Support Center Retention Bonus** | | | | | | |
| | | | | | | |
| **Managers @ 20% of Salary** | | | | | | |
| Total | | | | 25,830 | | |
| | | | | | | |
| **Directors @ 25% of Salary** | | | | | | |
| Total | | | | 329,050 | | |
| | | | | | | |
| **Senior Directors @ 33% of Salary** | | | | | | |
| Total | | | | 176,550 | | |
| | | | | | | |
| **Vice Presidents @ 50% of Salary** | | | | | | |
| Total | | | | 1,224,173 | | |
| | | | | | | |
| **Other Officers @ 50% of Salary** | | | | | | |
| Total | | | | 600,000 | | |
| | | | | | | |
| Grand Total | | | | $ 2,355,603 | | |
| | | | | | | |
| Per Person Average | | | | $ 60,400 | | |
| | | | | | | |



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| Note: Bonus will be paid on Period 10, 1998 through Period 11, 1999 base salary. |
| Position, base salary, and bonus amounts could vary with promotions or salary increases. |